Supreme Court, U.S.
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No. 93-622

# In the Supreme Court of the United States

OCTOBER TERM, 1993

CLYDE BELLECOURT, PETITIONER

*v.*

UNITED STATES OF AMERICA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the court of appeals correctly affirmed the district court's dismissal of petitioner's Federal Tort Claims Act (FTCA) suit for lack of subject matter jurisdiction on the ground that petitioner had failed to prove that he "first presented the claim to the appropriate Federal agency" as required by 28 U.S.C. 2675(a).

2. Whether the court of appeals properly affirmed the district court's grant of summary judgment on the issue of whether the misdiagnosis of petitioner's medical condition by a prison doctor constituted "cruel and unusual punishment" under the Eighth Amendment.

3. Whether the court of appeals erred in upholding the district court's dismissal of petitioner's pendent state medical malpractice claim on the ground that petitioner had failed to submit an expert affidavit as required by state law.

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### OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1-21) is reported at 994 F.2d 427. The decision of the district court (Pet. App. 23-101) is reported at 784 F. Supp. 623.

### JURISDICTION

The judgment of the court of appeals was entered on May 14, 1993 (Pet. App. 2), and a petition for rehearing was denied on July 19, 1993 (Pet. App. 22). The petition for a writ of certiorari was filed on October 18, 1993 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. Petitioner was confined at the Federal Medical Center, Rochester, Minnesota (FMC-Rochester), from May 5, 1987, through April 15, 1988, serving a five-year term for distribution of LSD. At approximately 12:30

a.m. on September 16, 1987, petitioner complained of chest pains to respondent correctional officer Lieutenant Cliff Friese. Respondent Dr. Alan Wynne, the physician on duty, was summoned to petitioner's cell by Lt. Friese. Dr. Wynne questioned the prisoner about his symptoms and conducted a physical examination. After diagnosing petitioner as suffering from indigestion and gastritis, Dr. Wynne administered an antacid and remained with petitioner until it appeared to him that petitioner's pain had subsided. Dr. Wynne advised petitioner to notify a prison officer if he experienced further pain. An officer checked on petitioner hourly throughout the night and observed petitioner sleeping. Petitioner did not request further medical assistance until he appeared for the 7:00 a.m. sick call at the prison clinic the following morning. An electrocardiogram (EKG) was performed which showed that a heart attack had occurred sometime earlier that morning, prior to petitioner's arrival at the clinic. Pet. App. 5-6.

2. a. Petitioner filed the instant suit on September 18, 1989, against the United States various FMC-Rochester officials[1] and Dr. Wynne[2] seeking monetary damages

[1] The complaint named as defendants: the United States; the Federal Bureau of Prisons; J. Michael Quinlan, in his official capacity as Director of the Federal Bureau of Prisons; FMC-Rochester; Peter Carlson, in his official capacity as Warden of FMC-Rochester; Dr. Michael Trujillo, in his official capacity as Medical Director of FMC-Rochester; Cliff Friese, in his official capacity as a Lieutenant at FMC-Rochester, and individually; the Mayo Foundation; Dr. Wynne in his official capacity as a resident physician for Mayo Foundation and as an employee of FMC-Rochester, and individually; and Sarah Urriste, in her official capacity as a physician's assistant for Mayo Foundation and as an employee of FMC-Rochester, and individually. Pet. App. 105-107.

[2] Because Dr. Wynne was not a federal employee, but an independent contractor with FMC-Rochester at the time of the

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under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.* and *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics Bureau*, 403 U.S. 388 (1971). Petitioner also alleged violations of his civil rights under 42 U.S.C. 1981 and 1985(3), and asserted a state law medical malpractice claim against Dr. Wynne pursuant to the district court's pendent jurisdiction. Petitioner claimed that the combined acts and omissions of the federal respondents and Dr. Wynne constituted negligence, medical malpractice, discrimination against him as a Native American, and deliberate and wilful indifference to his health and safety resulting in the unnecessary and wanton infliction of physical injury, permanent heart damage, and pain and suffering. Pet. App. 107-110. Based on affidavits and other evidence placed before the district court, see *id.* at 24, the court granted the federal respondents' motion for dismissal of the FTCA claim and for summary judgment on all other claims. *Ibid.*

b. The district court found that petitioner had not properly presented his FTCA claim because he failed to show (in accordance with 28 U.S.C. 2675(a)) that his administrative claim was actually received by the appropriate federal agency. Pet. App. 39. The court therefore dismissed the FTCA claim against the United States for lack of jurisdiction. *Id.* at 48-49. With respect to petitioner's Eighth Amendment claim, the district court concluded that petitioner had not placed sufficient facts in the record to prevail on a claim that respondents had shown deliberate indifference to his serious medical needs. *Id.* at 57-70. The court also found that there was nothing in the record to support petitioner's allegation

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alleged malpractice, he was represented by private counsel in the courts below.

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that respondents discriminated against him in the provision of medical care based on his status as a Native American and on his political activities. *Id.* at 55-57. The court also dismissed petitioner's pendent state law medical malpractice claim against Dr. Wynne for failure to submit an expert affidavit as required by state statute. *Id.* at 92, 100.

3. The court of appeals affirmed. Pet. App. 1-21. The appeals court stated that "[p]resentment of an administrative claim is jurisdictional and must be pleaded and proven by the FTCA claimant." *Id.* at 12. Because the jurisdiction in this case turned on a question of fact, the court held that it would review the district court's findings under the clearly erroneous standard. *Id.* at 10. In view of the district court's finding that petitioner had failed to meet his burden of proving that his "request for administrative remedy"[3] was actually received by the Federal Bureau of Prisons (BOP), the Eighth Circuit held that the district court did not err in dismissing the FTCA claim for lack of jurisdiction. *Id.* at 13.

The court of appeals also upheld the district court's decision to grant the federal respondent's motion for summary judgment on petitioner's Eighth Amendment claim. The court stated that "[t]he fact that Dr. Wynne misdiagnosed the appellant's condition, that his method of physical examination and treatment may not have fol-

[3] Although represented by counsel, petitioner used a form entitled a "request for administrative remedy," or a "BP-9," rather than the appropriate form, Standard Form 95 (28 C.F.R. 14.2), to submit his administrative claim. The court of appeals noted that while petitioner intended to comply with the FTCA despite his use of an incorrect form, undisputed facts in the record established that the "request for administrative remedy" was not mailed by certified mail, was not actually received by the BOP, and did not request money damages. Pet. App. 12-13.

lowed community standards, or that he disagreed with [petitioner's] suggested course of treatment d[id] not amount to deliberate indifference in violation of the Eighth Amendment." Pet. App. 16 (citing *Estelle* v. *Gamble*, 429 U.S. 97, 106 (1976); *Smith* v. *Jenkins*, 919 F.2d 90, 93 (8th Cir. 1990); and *Randall* v. *Wyrick*, 642 F.2d 304, 308 (8th Cir. 1981)). The appeals court similarly upheld the district court's grant of summary judgment to respondents on petitioner's civil rights claims, stating that petitioner had provided no evidence in support of his claims of discrimination or conspiracy.[4] Finally, the court of appeals also upheld the district court's dismissal of petitioner's pendent state law medical malpractice claim against Dr. Wynne for failure to submit an expert affidavit as required by state law. The court explained that this was not the "kind of case where the alleged negligence 'speaks for itself' without expert medical opinion." Pet. App. 19 (citing *Todd* v. *Eitel Hospital*, 237 N.W.2d 357, 361 (Minn. 1975)).

## ARGUMENT

1. Petitioner first claims that the court of appeals erred in upholding the district court's determination that he failed to prove that he had presented his FTCA claim to the BOP. The FTCA expressly provides that a "tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim ac-

[4] Petitioner does not challenge the court of appeals' holding on the discrimination and conspiracy claims in his petition for a writ of certiorari. Petitioner also does not challenge the court of appeals' holding, in agreement with the district court, that petitioner failed to raise a genuine issue for trial on his claim that the federal respondents and Dr. Wynne violated Minnesota's medical "bill of rights" for patients. Pet. App. 20-21.

crues." 28 U.S.C. 2401(b). A claim is deemed to have been "presented" when "a Federal agency receives from a claimant * * * an executed Standard Form 95 or other written notification of an incident." 28 C.F.R. 14.2(a).

Petitioner does not dispute that presentment of an administrative claim is a jurisdictional prerequisite to suit under the FTCA. Instead, he argues that the lower courts improperly placed the burden of proving presentment on him and failed to follow "the rule of presumption of receipt upon mailing." Pet. 52. This contention is meritless. The federal courts have long held that an FTCA claimant bears the burden of pleading and proving presentment. See, *e.g.*, *Bailey* v. *United States*, 642 F.2d 344 (9th Cir. 1981) (FTCA claimant has burden of showing presentment); *Barlow* v. *Avco Corp.*, 527 F. Supp. 269, 273 (E.D. Va. 1981) (claimant must prove actual receipt of claim by government). See also *Drazan* v. *United States*, 762 F.2d 56, 58 (7th Cir. 1985) ("mailing is not presenting; there must be receipt"). In light of this settled precedent, the court of appeals correctly affirmed the district court's dismissal of petitioner's FTCA claim based on petitioner's failure to prove that his claim had actually been received.

Even assuming that a presumption of receipt upon mailing arises in FTCA cases,[5] it was amply rebutted here by the government's direct proof of non-receipt. In making this finding, the district court reviewed deposition testimony from prison personnel charged with collecting, distributing, opening, and reading mail from

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[5] Petitioner cites several cases (Pet. 52, 55, 58-59 & n.10) in support of his contention that the court should have applied the presumption of receipt of his claim upon mailing. None of those cases involved the efforts of an FTCA claimant to satisfy the statutory requirement for filing an administrative claim.

prisoners to the warden. None had any recollection of seeing petitioner's claim form, and there was no written record of receipt of the claim. Pet. App. 43-49. Petitioner has not demonstrated that these findings are clearly erroneous.

2. Petitioner argues (Pet. 14-39) that the court of appeals also erred in upholding the district court's grant of summary judgment in favor of respondents on his Eighth Amendment claim. In *Estelle* v. *Gamble*, this Court held that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment." 429 U.S. at 104 (quoting *Gregg* v. *Georgia*, 428 U.S. 153, 173 (1976) (joint opinion)). More recently, in *Wilson* v. *Seiter*, 111 S. Ct. 2321, 2324 (1991), this Court explained that the inmate's claim in *Estelle* that prison doctors had inflicted cruel and unusual punishment by inadequately attending to his medical needs was rejected because the inmate had "failed to establish that [the defendants] possessed a sufficiently culpable state of mind." *Wilson*, 111 S. Ct. at 2323. In reaffirming the *Estelle* analysis, the Court explained that "allegations of 'inadvertent failure to provide adequate medical care' or of a 'negligent * * * diagnosis,' simply fail to establish the requisite culpable state of mind." *Wilson*, 111 S. Ct. at 2323 (quoting *Estelle*, 429 U.S. at 105-106). In order to be liable for a violation of the Eighth Amendment, it is not enough for a prison official to be negligent in the delivery of medical care to prisoners; the official must manifest "deliberate indifference" to a prisoner's serious medical needs. *Estelle*, 429 U.S. at 106.

Petitioner argues he was subjected to "cruel and unusual punishment violative of the Eighth Amendment" (Pet. 15) because Dr. Wynne did not order an EKG although petitioner was experiencing symptoms consis-

tent with a heart attack.[6] As the court of appeals held, however, the fact that Dr. Wynne's "method of physical examination * * * may not have followed community standards * * * does not amount to deliberate indifference in violation of the Eighth Amendment." Pet. App. 16. This Court made clear in *Estelle* that not "every claim by a prisoner that he has not received adequate medical treatment states a violation of the Eighth Amendment." 429 U.S. at 105.

In this case, the court of appeals upheld the district court's determination that the facts alleged by petitioner would fail to establish that Dr. Wynne and the other defendants possessed the requisite culpable state of mind of "deliberate indifference" to petitioner's serious medical needs. The court of appeals found that the failure to order an EKG in the context of his case would, at most, constitute an error in medical judgment, but not the obdurate refusal to provide necessary medical care that would represent cruel and unusual punishment. That determination comports with the distinction found in this Court's cases between "deliberate indifference" to serious medical needs, and mere negligence in the provision of medical care. See, *e.g.*, *Estelle*, 429 U.S. at 107 (question whether additional diagnostic techniques are indicated is a classic example of a matter for medical judgment).

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[6] He also asserts that he was abandoned in his cell "in severe pain without treatment." Pet. 15. In rejecting this contention below, the district court found, based on evidence before the court, that a guard checked on petitioner every hour after Dr. Wynne left and found petitioner sleeping. Pet. App. 62. Petitioner presented no evidence supporting his bare allegation that he requested further medical assistance during the night and that he was deliberately denied that care. *Ibid.*

Petitioner contends that the court of appeals in this case, in contrast with courts in other circuits (Pet. 23-38 & nn.3-4), has adopted a *per se* rule altogether "exempt[ing] grossly negligent misdiagnosis utilizing easier and less efficacious treatment" from Eighth Amendment liability. Pet. 38. Petitioner misreads the decision below. The court of appeals did not adopt any *per se* rule. Rather, the court of appeals concluded, based on facts as found by the district court, that Dr. Wynne's care and treatment of petitioner manifested, at most, an error in diagnostic judgment. Pet. App. 16. That fact-bound determination is not clearly erroneous, is fully consistent with the decisions of other courts of appeals cited by petitioner, and does not merit review by this Court.

3. Finally, petitioner urges this Court (Pet. 39-51) to review this case to determine whether the court of appeals erred in upholding the district court's decision to dismiss petitioner's pendent state law medical malpractice claim because petitioner failed to submit an expert affidavit as required by a Minnesota state statute. Even if there were a disagreement among the state and federal courts concerning the proper application of the Minnesota statute to a state malpractice claim, that issue would not warrant review by this Court. In any event, no such disagreement exists. The courts that have applied Minnesota law have sometimes allowed malpractice claims to go forward without an expert affidavit where expert testimony was found unnecessary to establish that a diagnosis or treatment was negligent. See, *e.g.*, *Chizmadia* v. *Smiley's Point Clinic*, 873 F.2d 1163 (8th Cir. 1989); *Bauer* v. *Friedland*, 394 N.W.2d 549 (Minn. Ct. App. 1986), and cases cited at Pet. 40, 45 & n.7. The district court specifically found in this case, however, that the jury required "expert assistance to establish

the standard of care for diagnosing a heart attack," because "[l]ay jurors do not possess the knowledge to differentiate between a heart attack and other potential causes of chest pain." Pet. App. 89-90. The court of appeals reiterated that conclusion by stating that this was not a case in which "the alleged negligence 'speaks for itself' without expert medical opinion." *Id.* at 19.

## CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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